

THE NEW HAVEN SCHOOL OF INTERNATIONAL LAW:

AN INVITATION TO A POLICY-ORIENTED

JURISPRUDENCE\*

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I. Introduction

In the last quarter-century the writings by Professors Myres S.

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\*I am indebted to Michael Forde of Cambridge University for his critical comments and many useful suggestions on an earlier draft of this essay. Responsibility for the views expressed, however, is my own.

This is an essay of invitation addressed to anyone interested in the New Haven school of jurisprudence. Because many scholars and decision-makers believe that law is no more than an autonomous body of rules and brush aside jurisprudential consideration of policy as an intrusion of "politics" into the realm of "law," this essay at the same time means to welcome a debate necessary for dissipating the misunderstanding about the exact role of policy consideration in legal science and improving an intellectual framework for rational decision. More than two decades have elapsed since Professors McDougal and Lasswell urged a "new direction" in legal education. As their recommendation has generally fallen upon deaf ears and as many students are not aware of it, the core of their argument needs reiteration:

The major contours of our contemporary confusion have long been plainly visible. Heroic, but random, efforts to integrate "law" and "the other social sciences" fail through lack of clarity about what is being integrated, and how, and for what purposes. Lip-service is paid to the proposition that legal concepts, institutions, and practices are instrumental only; but the main organizing foci for determining both fields and courses, and arrangement within fields and courses,

McDougal, Harold D. Lasswell, and W. Michael Reisman have marked the

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of a swollen and shapeless curriculum are still time-worn, overlapping, legal concepts of highest-level abstraction. Any relation between the factual problems that incidentally creep into particular fields or courses, in a curriculum so "organized," and the important problems of contemporary society is purely coincidental; and all attempts to relate such fields or courses to each other are frustrated by lack of clear social goals and inadequate criteria of importance.

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A first indispensable step toward the effective reform of legal education is to clarify ultimate aim. We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic training for policy-making. The proper function of our law school is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.

This end is not proposed as something utterly new or exotic. . . . None who deal with law, however defined, can escape policy when policy is defined as the making of important decisions which affect the distribution of values. Even those who still insist that policy is no proper concern of a law school tacitly advocate a policy, unconsciously assuming that the ultimate function of law is to maintain existing social institutions in a sort of timeless status quo; what they ask is that their policy be smuggled in, without insight or responsibility. But neither a vague and amorphous emphasis on social "forces," "mores," and "purposes" nor a functionalism that dissolves legal absolutism for the benefit of random and poorly defined ends nor a mystical invocation of the transcendental virtues of an unspecified good life can effect the fundamental changes in the traditional law school that are now required to fit lawyers for their contemporary responsibilities. Their direction is toward policy but their directives are at too high a level of abstraction to give helpful guidance. What is needed now is to implement ancient insights by re-

emergence of a new theory about law.<sup>1</sup> It is blended by the traditions of American legal realism and some of the best contemporary thought of the

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orienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility.

Lasswell & McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 43, 44, 46-47 (1943).

Reiterating parts of the 1943 statement, I am, in effect, suggesting that they launch their renewed activities to reform legal education for the future. In light of a general change in attitudes toward multidisciplinary studies and unavoidable needs for integrating law and social sciences, and with a larger and growing "constituency" which now exists throughout the country, a renewed recommendation may precipitate significant recognition of needs for a multidisciplinary, problem-oriented and contextual intellectual framework for inquiry. What is needed now is an impetus and catalyst by which law school reformers, potentially sympathetic to the New Haven recommendations, will be "triggered" into redesigning legal education at their own law schools. Those reformers may need a new set of symbols to which they can conveniently resort in stimulating their intellectual environment and justifying their efforts.

<sup>1</sup>The principal published works of the New Haven School of International Law include: Harold D. Lasswell & Abraham Kaplan, *Power and Society* (1950); Myres S. McDougal & Associates, *Studies in World Public Order* (1960); McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961); McDougal & William T. Burke, *The Public Order of the Oceans* (1962); McDougal, Lasswell & Ivan A. Vlasic, *Law and Public Order in Space* (1963); McDougal, Lasswell & James C. Miller, *The Interpretation of Agreements and World Public Order* (1967); Douglas M. Johnson, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (1965); B. S. Murty, *The Ideological Instruments of Coercion and World Public Order* (1967); W. Michael Reisman, *Nullity and Revision: The Review of Enforcement of International Judgments and Awards* (1971). Works in progress include: McDougal, Lasswell & Lung-chu Chen, *Human Rights and World Public Order*, from which the authors have published preliminary outlines, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry," 63 Am. J. Int'l L. 237 (1967), "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying Community Policies," 14 Va. J. Int'l L. 387 (1974), and a section "Nationality and Human Rights: The Protection of the Individual in External Arenas," 83 Yale L. J. 900 (1974);

social sciences<sup>2</sup> and exhibits the common framework of inquiry, distinctively identifiable in its coherent and systematic approach to the study of law.

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Lasswell & McDougal, *Law, Science and Policy: The Jurisprudence of a Free Society*, of which two chapters have been published, "Criteria for a Theory About Law," 44 S. Cal. L. Rev. 362 (1971), and "Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process," 41 Ge. Wash. L. Rev. 1 (1972); McDougal, Lasswell & Reisman, *The World Constitutive Process and Public Order*, of which three chapters have been published, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 Va. J. Int'l L. 138 (1968), "World Constitutive Process of Authoritative Decision," 19 J. Legal Ed. 253, 403 (1967) and "The Intelligence Function and World Public Order," 46 Temple L. Q. 365 (1973).

"How long will our collaboration last?" asked Professor Lasswell, and answered himself, "As long as we do." Lasswell, "In Collaboration with McDougal," 1 Denver J. Int'l L. & Policy 17, 19 (1971).

<sup>2</sup>See generally Lasswell & McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 403 (1943); McDougal, "Fuller v. The American Legal Realists: An Intervention," 50 Yale L. J. 827 (1947); McDougal, "The Law School of the Future: From Legal Realism to Policy Science in the World Community," 56 Yale L. J. 1345 (1947), in which Professor McDougal urged a new direction for legal education which would integrate social sciences and law:

It is . . . the opportunity, and the obligation, of this law school, as of other law schools, to emerge from the destructive phase of legal scholarship--indispensable though destruction was--and to center its energies upon conscious efforts to create the legal institutions, doctrines, and practices of the future.

The time has come for legal realism to yield predominant emphasis to policy science, in the world community and all its constituent communities. It is time for corrosive analysis and inspired destruction to be supplemented by purposeful, unrelenting efforts to apply the best existing scientific knowledge to solving the policy problems of all our communities.

Id. at 1349.

They call this new theory "a policy-oriented jurisprudence" since a jurisprudence that conceives law as a product of and an instrument in society must promote preferred ends of a society. Their approach to law continually attracts students specializing in international law to New Haven who afterward go out to create and disseminate their own approach to, and application of, this theory, sometimes referred to as "a configurative jurisprudence." Some observers call this emerging group of scholars from New Haven and their characteristic conceptions of law "The New Haven Approach"<sup>3</sup> or "The Yale School of International Law,"<sup>4</sup> in allusion to, and contrast with, Hans Kelsen's Vienna school.<sup>5</sup>

"A school" emerges both self-consciously and by being identified as such by others; a group, if significant, may develop into a school when its practice of the common mode of expression or its application of a common methodology flourishes at a given time and space.

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Though this statement was made in 1947, in light of a burgeoning revival of interest in the New Haven school, it is hoped that the hypotheses of McDougal, Lasswell, and Reisman will receive critical examination and constructive challenges. For recent renewed jurisprudential interest in the New Haven school, see Young, "International Law and Social Science: The Contributions of Myres S. McDougal," 66 Am. J. Int'l L. 60 (1972); McDougal, "International Law and Social Science: A Mild Plea in Avoidance," *id.* at 77. 14 Va. J. Int'l L. (1974), a special issue highlighting "The Lasswell-McDougal Approach," which include articles such as: McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies," at 387; Wood, "Public Order and Political Integration in Contemporary International Theory," at 423; Little, "Toward Clarifying the Grounds of Value-Clarification: A Reaction to the Policy-Oriented Jurisprudence of Lasswell and McDougal," at 451; and Tipson, "The Lasswell-McDougal Enterprise: Toward A World Public Order of Human Dignity," at 535.

<sup>3</sup>Falk, "On Treaty Interpretation and the New Haven Approach," 8 Va. J. Int'l L. 330 (1968).

<sup>4</sup>Gottlieb, "The Conceptual World of the Yale School of International Law," 21 World Pol. 109 (1963). Farer, "International Law and Political Behavior: Toward A Conceptual Liaison," 25 World Pol. 430 (1973).

<sup>5</sup>Kunz, "The 'Vienna School' and International Law," 11 N. Y. Univ. L. Q. Rev. 370 (1934), reprinted in *idem*, The Changing Law of Nations: Essays on International Law 59 (1968). See also Lador-Lederer, "Some Observations on the 'Vienna School' in International Law," 57 Nether. Int'l L. Rev. 126 (1970).

By the New Haven school, I refer to this group of scholars spread throughout the nation who have self-consciously chosen to guide their studies by applying the framework of inquiry originated by McDougal and Lasswell. A point of departure for the New Haven school from its traditional counterparts can be traced back as far as the annual meeting of the American Society of International Law of 1947, where Professor McDougal, attending the Society's meetings for the first time, was "just a little shocked and disappointed"<sup>6</sup> by what he heard at the meeting. Before a group of established international lawyers who were discussing the codification of international law as a body of rules, he said that he was more interested in bringing some of the best critical thought from other social sciences to bear upon law.<sup>7</sup> By way of introducing an alternative approach, he stressed the importance of studying "how people use words," "how the human mind works," and "variables that affect official behavior,"<sup>8</sup> and to know "who is using these principles of international law, these recognized doctrines, in what context, to get what results, with respect to whom."<sup>9</sup>

In contrast with traditional schools of jurisprudence, the New Haven school takes into account, in its comprehensive analysis, many variables which affect the process of decision-making, other than "legal norms." This school's full impact, particularly upon international law, is beginning to be felt throughout the United States as its approach is "transmitted by the rapid spread of [its] teaching in scores of universities across the country."<sup>10</sup> In fact, no international lawyer can afford to ignore the impact of the New Haven school and the contributions it has made to the study of his subject. Throughout history it has not been uncommon for great schools of thought to disappear over time as the frequency and visibility of writings of their founders decrease, or the creative individuals forming the core of the school disperse to other endeavors. However, it can safely be said that the New Haven school will continue to exist as a dynamic school of inquiry in a world of changing environments: Professor W. Michael Reisman is assuming the same leadership as McDougal and Lasswell, maintaining and stimulating the school's

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<sup>6</sup>Remarks by McDougal, [1947] Proceedings Am. Soc'y Int'l L. 47.

<sup>7</sup>Ibid.

<sup>8</sup>All quotations from Ibid.

<sup>9</sup>Id. at 48.

<sup>10</sup>Gottlieb, supra note 4 at 203.

intellectual tradition.

Various comments and criticisms have been directed toward the New Haven approach sometimes described as "a policy-oriented jurisprudence."<sup>11</sup> Traditionalists have accused it of:

. . . fusing law and policy in a manner that threatens to turn international law into a convenient instrument of national policy—as is the case in totalitarian countries, or as it is characterized by the more radical exponents of *Realpolitik*; one that approves of nationalist policies, provided that the policy maker is on the "right" side, *i.e.*, an exponent of the values of "human dignity," and the state or group of states against whom such policy is exercised is not.<sup>12</sup>

Works written along the lines of the New Haven approach have been referred to as products of "a computer, 'fed' with such factors as skills, power, enlightenment, value, well-being—each having the same magnitude—and 'programmed' to put every fact and concept in a predetermined place."<sup>13</sup> The approach has been characterized as "the magical Lasswellian categories that are assumed of giving to whoever uses them whatever result he wants to reach."<sup>14</sup> Those who appear to have heard the story of "Law, Science, and Policy," but, perhaps, never tried to come to terms with it, offer the somewhat superficial criticism that "L.S.P. is currently the jurisprudential counterpart of L.S.D.: its effects on individuals vary from exhilaration, to deep depression, to indifference and nobody is quite sure to what extent it is habit-forming. There are some who would make it the basis of a religion."<sup>15</sup>

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<sup>11</sup> The most comprehensive statement of the New Haven school to date appears in McDougal, Lasswell & Reisman, "Theories About International Law: Prologue to A Configurative Jurisprudence," 8 Va. J. Int'l L. 188 (1968).

<sup>12</sup> Friedmann, "Book Review," 64 Colum. L. Rev. 606, 608 (1964).

<sup>13</sup> Fawcett, "Bookreview," [1963] Brit. T. B. Int'l L. 531, 532.

<sup>14</sup> Hoffmann, "International Law and the Control of Force," in *The Relevance of International Law* 34, 46 (K. Deutsch & S. Hoffmann eds., 1968; Anchor edn. 1971).

<sup>15</sup> W. L. Twining, *Pericles and the Plumber* 25 (1967).

Possibly the most frequent criticism leveled against it is that "the sheer labour of coping with [the New Haven approach's] terminology is too oppressive."<sup>16</sup> Yet it cannot be said that the approach McDougal, Lasswell, and Reisman recommend has received adequate critical examination. Of course the New Haven approach is maddening only to those who do not want to understand it in the first place. It may be noted here that ignorance is sometimes opportunistic and expedient. Like knowledge which can be purposefully acquired, ignorance can also be purposefully directed and perpetuated.<sup>17</sup> Due to its strikingly revolutionary method of analysis, much confusion and misunderstanding have inevitably been borne in the course of evaluating this jurisprudence.<sup>18</sup>

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<sup>16</sup>Bowett, "Book Review," [1962] Brit. Y. B. Int'l L. 517.

<sup>17</sup>Gunner Myrdal, *An American Dilemma* 40-42 (1944).

<sup>18</sup>Professor McDougal's approach, writes Professor Richard A. Falk,

remains unacceptable to those within the realm of power because his jurisprudence represents such a radical challenge to established values. To make policy explicit in periods of change and confrontation is to rob law of its mystifying potency. Such an exposure generates subversive tendencies, however unintentionally, that undermine fixed patterns of respect thinking, feeling, and acting. . . .

My point here is that Professor McDougal's work if properly understood is the acme of policy explication and this almost necessarily has a radicalizing impact that largely disqualifies its adherents from serving the state in a mere professional capacity. The policy voice remains audible in a manner that challenges the division of labor and technicist ethos which large-scale organizations, particularly governments and corporations, depend and insist upon. McDougal's emphasis on policy analysis tends to produce international lawyers who cannot be counted upon, and who therefore are potentially dangerous presences within the organizational structure.

Falk, "The Place of Policy in International Law," 2 Supp. 2 Ga. J. Int'l & Comp. L. 29, 32 (1972). This assessment by Professor Falk, who as a member of the "loyal opposition" critically contributes from within to the improvement of the framework of inquiry, is convincingly demonstrated in a recent article on nationality. In accordance with their clari-



As a point of departure, the New Haven approach establishes what may be referred to as a teleological orientation toward the function of law in a community. Lasswell and Kaplan in one principal book call their position "hominocentric politics," and define it: "As science, it finds its subject matter in interpersonal relations, not abstract institutions or organizations; and it sees the person as a whole, in all his aspects, not as the embodiment of this or that limited set of needs or interests. As policy, it prizes not the glory of a depersonalized state or the efficiency of a social mechanism, but human dignity and the realization of human ca-

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fied policy of "the utmost voluntarism in affiliation, participation, and movement, with an easy assumption of states of a competence to protect such individuals as seek their protection," McDougal, Lasswell and Chen recommend a community policy for decision which reads in part:

Save for conflict with the most urgent state necessities, people ought thus to be allowed freely to determine their nationality subsequent to birth. Their wishes should be made largely the decisive factor, with only a modest deference toward criteria designed to protect state interests. In support of these policies procedures for establishing and withdrawing nationality should not be honored when they are so arbitrary as to negate whatever protection may otherwise be provided for the individual. Requirements for establishing and providing nationality need not, in order to preclude fraud, be so strict as to make compliance impossible. For the further protection of private choice, comparable policies might be recognized for the withdrawal of nationality. States should not be permitted arbitrarily (as for purposes of discrimination or punishment) to withdraw nationality, nor arbitrarily to preclude voluntary change of nationality. Statelessness should, by some one of many expedients, be abolished.

McDougal, Lasswell & Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas," 83 Yale L. J. 900, 903, 905 (1974). And in keeping with the goal of human dignity, the authors conclude, "nationality must be made to serve the development and happiness of human beings, and not to perpetuate human bondage by anchoring people, against their will, in a particular territorial community or alternatively casting them adrift when it is withdrawn." Id. at 998. Given the characteristic

pacities."<sup>19</sup> McDougal applies the policy science espoused by Lasswell to the study of international law. Thus, he challenges "widely accepted notions,"<sup>20</sup> causing "uneasiness among some skeptical professional colleagues,"<sup>21</sup> and complaints of his "highly esoteric private language."<sup>22</sup>

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nature of "nationality" as "the paramount interests of state elites in the control of people as important bases of power" their recommendations will tremendously diminish the exclusive power and control of state elites. These recommendations include: (1) that individuals be authorized to protect themselves; (2) that the individual be allowed to freely associate himself with a state by withdrawing his old nationality and choosing a new one; (3) that the protection of nationality by some organized international body be given to the individual on the global level, including the establishment of a group of "United Nations citizenship." *Id.* at 993-995. These radical recommendations, which by state elites may regard as "subversive", are made possible only when the observer commits himself, as the authors do, to the values of human dignity as his clarified policy and go beyond the nation-state system.

<sup>19</sup>Lasswell & Kaplan, *Power and Society* xxiv (1950).

<sup>20</sup>Dillard, "The Policy-Oriented Approach to Law," 40 *Va. Q. Rev.* 625 (1964).

<sup>21</sup>*Ibid.*

<sup>22</sup>Fitzmaurice, "Vae Victis, Or Woe to the Negotiators! Your Treaty or Our 'Interpretation' of It?" 65 *Am. J. Int'l L.* 358, 360 (1971). The most common and typical criticism is directed against the specialized terminology of the New Haven school. See, e.g., Fawcett, Book Review [1963] 34 *Brit. Y. B. Int'l L.* 531, 532: "its weakness lies in the verbiage it generates and in the avoidance of familiar terms where they would do: for example, 'wealth deprivation' and even more unexpected 'rectitude' seem no good substitutes for 'damage' and 'choice of values'." Another Englishman commented: "No doubt the question has already been asked whether in final analysis, the Yale approach will have done a disservice to American legal scholarship, in the sense that many worthwhile works will achieve less impact in the world at large because people will not read them, or, if they do, fail to find the analysis and approach helpful. It would be a pity if scholars were deterred from reading this." Bowett, Book Review, 22 *Int'l & Comp. L. Q.* 401 (1973). Compare these observations with Gunnar Myrdal's growing disrespect for "traditionally rigid boundary lines between separate disciplines of social sciences as they have developed pragmatically to fit teaching purposes and to meet the need for specialization." Professor Myrdal states:

Professor Richard A. Falk of Princeton calls McDougal's theory "dangerous knowledge".

His enterprise to create a world public order based on the values of human dignity is a radical world order vision of prime magnitude. It is universal in scope (that is, the conception is non-hierarchical, and is even susceptible of taking an anti-governmental twist); it is process-oriented in relation to the future (that is, we create the future by promoting preferred values in all critical arenas, starting now); it is oriented toward the well being of the species as a whole and is thus naturally receptive to both an ecological perspective and a futurist concern with assuring the life-chances of subsequent generations.<sup>23</sup>

McDougal's efforts to reformulate the relevance of law to human affairs on a global level is "dangerous," because, continues Falk, "it threatens the prevailing paradigm, and hence draws fire from certain kinds of professionals who continue to believe in [the traditional nation-state system]." <sup>24</sup>

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The rationale for this disrespect was my growing recognition of the fact that in reality there are not economic, sociological, or psychological problems, but simply problems, and that as a rule they are complex. The one and only type of concept that it is permissible to keep vague is the meaning of terms such as economics, sociology, psychology, or history since no scientific inference can ever depend on their definitions. This point, as we know, is not always acknowledged even today but was admitted still less than forty years ago. In those days labor was often wasted on finding the precise definition of one or another of our several social science disciplines in the belief that this was an important activity.

Myrdal, Objectivity in Social Research 10-11 (1969). Emphasis original.

<sup>23</sup> R. A. Falk, The Sherrill Lectures delivered at the Yale Law School, 1974.

<sup>24</sup> Id. at 67.

In his recent article, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell,"<sup>25</sup> Professor John Norton Moore of Virginia has provided us with an introduction to the New Haven approach. Hence, at the risk of recapitulating what Professor Moore has already explained in that article, I intend, nevertheless, to offer an introduction to basic ideas prevailing in the New Haven school of jurisprudence. By basic ideas, I refer to some of the intellectual underpinnings upon which the New Haven school is founded. As a student of the New Haven school, through this essay I invite readers into the gateway of the New Haven school, and offer a small guidebook and map for the further study of it.<sup>26</sup> It is hoped that the exposition of some of the concepts underlying a policy-oriented approach may help readers through some of the complexities of the New Haven school.

## II. The Myth of Objectivity

The New Haven approach requires that the observer, at the outset, appreciates that he cannot be a wholly objective analyst of the community process he examines as he is both a product of and a participant in that very process.<sup>27</sup>

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<sup>25</sup> Moore, "Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell," 54 Va. L. Rev. 662 (1968).

<sup>26</sup> A biographical sketch of the development of the New Haven school is provided by Tipson, "The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity," 14 Va. J. Int'l L. 535 (1974).

<sup>27</sup> "It is well known that the technique of analyzing definitions and criticizing propositional statements does not enable the ego to obtain access to 'inconscious'. The conscious process itself may be under the domination of repetitive compulsions which are outside the awareness of the thinker. If rationality includes the notion of freedom of choice and hence of freedom from obsession and compulsivity, it is obvious that rational thinking requires the use of appropriate procedures by means of which the thinker obtains access to pertinent facts about the self." Lasswell, "Clarifying Value Judgment: Principles of Content and Procedure," 1 Inquiry 87, 92 (1958).

An environment in which the observer finds himself reflects itself through his perspectives and attitudes; his standards of behavior have been fashioned by continuing socialization within members of his groups and his reference to non-group members.<sup>28</sup> A family is a primary group in the sense that how his family socialized the observer bears a significant effect upon his attitudes and perspectives.<sup>29</sup> The extent to which he is bound by religion, traditions, and customs of the immediate community in which he lives shapes his subjectivity. Beyond such a primary environment, he has been exposed to a larger environment: the level of education he has acquired, the range of associations he has affiliated with, and so on.

These environmental variables contribute to shaping the observer's predisposition through time. Accumulated predispositions, in turn, can determine how he will select and affect his group associations and larger environment.

The predispositional variables can be most conveniently described in terms of: 1. The identifications the observer establishes in his relation to other individuals and groups; 2. His demands for preferred interests, including those of pursuing an inquiry; and 3. Expectations about his own losses or gains.

1. Identifications: what the observer identifies himself with may vary in scope and intensity: he can identify strongly as well as exclusively with a particular class or any of kinship, ethnic, functional or professional groups. However, such identifications can be more inclusive without jeopardizing primary identity.<sup>30</sup> In fact, an

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<sup>28</sup>Robert Merton, *Social Theory and Social Structure*, 281ff (Rev'd & enl'd edn., 1957).

<sup>29</sup>Herbert H. Hyman, *Political Socialization: A Study in the Psychology of Political Behavior* 51-66 (1959).

<sup>30</sup>See Lasswell, "Future Systems of Identity in the World Community," in 4 Cyril E. Black & Richard A. Falk (eds.), *The Future of the International Legal Order* 3 (1972). Professor Lasswell asks "whether a sense of political identity comparable to nationalism is developing or can develop in support of a world-inclusive system of public order." *Id.* at 4. "The paradigm of an enlarging identity system in a group is the per-

identity is one's personal psychological association with other individuals or groups according to the intensity and scope of one's own interests. This identity is critical in assuming any role in a community. If the observer identifies with decision-makers and acts as a decision-maker, his framework of inquiry may be of very limited significance.

2. Demands: What the observer seeks to achieve is closely related to his identifications as in most cases his objectives are formulated in the interests of individuals or groups with which he identifies. State elites, for example, continuously strive to implement policies which will sustain them in power. The advocate attempts to win a case for his client, thus improving his own skill and reputation. The scholarly observer's principal scope value is enlightenment gathering, and processing information, and disseminating and promoting knowledge. When the observer learns that state elites do not subscribe to clarified general community policies, he may seek to promote these policies, and thus to change the elites' perspectives.

3. Expectations: Matter-of-fact perceptions of the observer's past and present experiences and future expectations about the consequences of what he is or will be doing may affect his attitudes toward the problem he is concerned with. In some circumstances expectations concerning his losses or gains may perforce unavoidably compel him to change his identification and demands. The attraction of an increase in power, wealth, or respect may lure him to forsake his responsibility as a member of the larger community of mankind.<sup>31</sup>

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ception of a common threat of value deprivation and of possible joint action to prevent loss or even to obtain value gains. A shared field of attention thus generates a map of expectation." Id. at 7.

<sup>31</sup>Consider, for example, judges of a domestic court before which a claim was lodged against a new de facto regime after the coup. Their attitudes toward the coup, their expectations in particular, about both the outcome of the coup and the value position to be affected by the decision they are going to make, tremendously affect the direction of events. In most cases, as in Rhodesia's Madzimbamuto v. Lardner-Burke N.O., domestic judges sitting in the midst of a constitutional crisis choose to rescue their values first by a putative declaration of independence from the coup regime, thus allowing the regime to consolidate its control and by disguising "their choice with a spurious legal respectability by garbing it in the philosophical reasoning of Kelsen." Palley, "Rethinking the Judicial Role: The Judiciary and Good Government," 1 *Zambia L. J.* 1, 8 (1969). For detailed exposition of correlations between decisions after the coup and Judges' perspectives, see Palley, "The Judicial Process:

Social inquiry cannot proceed wholly free from bias--from the bias of those who conduct the inquiry and of those who appreciate its outcome. Objectivity cannot be achieved by simply collecting facts and presuming that they speak for themselves. Facts are not evens; they are often the conclusions the observer has drawn from observing events. How the observer collects the facts necessary for his inquiry and how he establishes the causal relationship among them cannot be answered without some preconceptions as to the events he is observing and the goals he seeks.<sup>32</sup>

### III. Standpoints of the Observer and of the Decision-Maker

Although the New Haven school distinguishes the role of the decision-maker and that of the scholarly observer, it recognizes their interrelationship.<sup>33</sup> Kelsen, as we will discuss below,<sup>34</sup> distinguished the scientific interpretation of the law from the political interpretation of the law. The former, according to him, is done by a legal scientist and the latter by an official of state. With this distinction, Kelsen suggests that a legal scientist reject the choice between alternatives of interpretation of a legal norm unless the choice is guided by its higher

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U.D.I. and the Southern Rhodesian Judiciary," 30 Mo. L. Rev. 263, 269-271. In particular, biographical sketches of each judge in Rhodesia's case were explored in id. at 265-268.

<sup>32</sup>"Facts do not organize themselves into concepts and theories just by being looked at; indeed, except, within the framework of concepts and theories, there are no scientific facts but only chaos. There is an inescapable a priori element in all scientific work. Questions must be asked before answers can be given." G. Myrdal, *The Political Element in Development of Economic Theory*, Preface to the English edition, at ix-xvi (1965). See also Karl Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* 5 (1936).

<sup>33</sup>Lasswell & McDougal, "Criteria for a Theory About Law," 44 S. Cal. L. Rev. 362, 379-382 (1971).

<sup>34</sup>See pp. 41-2 infra.

norm.<sup>35</sup> In contrast, McDougal suggests that a choice be made between these alternatives according to policies projected in the legal norm in question and to the perspectives of people living in the changing conditions of economic, social, and political structure. He further maintains that this is the legal scientist's task which should not be left entirely in the hands of state officials. Since the legal scientist has responsible expertise to interpret and clarify basic community policies embodied in legal norms and procedures, and since he has frequent opportunities to observe such legal norms and procedures in action, he must act to promote the basic goal and purpose he recommends to the community.

This scholarly task of making the choice has to be performed by establishing an observational standpoint in the course of inquiry. Without this disengaged and observational standpoint, the scholar's choice will be no different from that of the actual decision-maker or the claimant who demands remedies invoking a particular legal norm. A critical need for establishing the observer's standpoint is that the role of the scholarly observer and that of the decision-maker are distinguishable and their functions are different from one another. The scholar is primarily interested in acquiring knowledge and in understanding the aggregate interrelationships of authoritative decisions and their effects upon various sectors of a community;<sup>36</sup> whilst the decision-maker is primarily in-

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<sup>35</sup>Hans Kelsen, *The Pure Theory of Law* 118 (1967); *idem*, *The General Theory of Law and State* 31-32 (1945, 1961). See also Harris, "When and Why Does the Grundnorm Change?" 29 *Camb. L. J.* 103 (1971). Kelsen's theory about Grundnorm has still contributed to the most dangerous "legitimation" of effective control by mere invocation of change in the basic norm. It is curious to assert that Kelsen's theory being "pure" and "apolitical," licensed "the judges in the revolution cases . . . to accept the legality of the successful revolutions concerning in their respective countries, without entering the political arena." Harris, *supra*, at 104. This attitude is a sheer submission to controlling events regardless of their direction, thus making the submission unavoidably political. Cf. Palley's conclusion: "Politically the decision assists the regime." Palley, "The Judicial Process," note 25 *supra*, at 286-287.

<sup>36</sup>McDougal, Lasswell, & Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence," 8 *Va. J. Int'l L.* 188, 199 (1968).



terested in making effective choices which he enforces in order to maintain a preferred social order of the community.<sup>37</sup> Therefore, when Professor Haas asserts that values of human dignity, which the New Haven school recommended for commitment, are not subscribed to by state officials throughout the globe and that they are "the utopia cherished by authors,"<sup>38</sup> he fails to establish an observational standpoint independent of the state officials' perspective. The enlightenment function, which the scholarly observer undertakes, should not merely offer an explanation of what goes on in reality for its own sake,<sup>39</sup> but should include policy recommendations reached by systematic and disciplined analysis to promote goal values. Thus, the New Haven school recognizes the influence the scholarly observer can exercise. Professor Haas has simply relinquished an opportunity to enlighten state elites and change their views.<sup>40</sup> While decision-makers need the knowledge and understanding which scholars offer in order to reach rational decisions, the scholar who is himself a participant in the social process which he observes, often unavoidably and sometimes deliberately performs the role of decision-maker in the information-gathering and promotion. This decision-making role about inquiry is unavoidable because "data comes to us only in answer to questions, and it is we who decide not only whether to ask but also how the question is to be put."<sup>41</sup> Furthermore, as a responsible citizen and a moral person, the scholar has his own values and whatever he selects, he selects for a reason which is related to his own preferences and goals. This is quite natural insofar as he is a human being. Yet, the fact that a scientist has reasons for his choice of problems other than a thirst for knowledge or a love of truth scarcely makes his

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<sup>37</sup> Ibid.

<sup>38</sup> Ernst B. Haas, Human Rights and International Action: The Case of Freedom of Association 131-132 (1971).

<sup>39</sup> Stanley Hoffmann, Contemporary Theories in International Relations 10 (1960).

<sup>40</sup> Cf. Robert Lynd, Knowledge for What? (1939), and Karl Mannheim, Man and Society (1940).

<sup>41</sup> Abraham Kaplan, The Conduct of Inquiry 385 (1964). See also I G. Myrdal, Asian Drama 24-26 (1968).

conduct of inquiry biased thereby.<sup>42</sup> In the course of inquiry into the world power process scientific interests need not exclude the interests of policy. Rather, the New Haven school explicitly assumes both a role "serving as a means of self-orientation in a flow of events of changing significance"<sup>43</sup> and "an instrumental role in implementing policy,"<sup>44</sup> and claims to be a policy science that clarifies the process of decision-making in the world community and offers intelligence and materials necessary for rational decision about policy issues. Thus, the scholarly observer concerned with the appraisal of the world power process should establish the bases for his appraisal as explicitly as possible, thereby enabling other observers to evaluate what he observes. As Gunnar Myrdal said, "the attempt to eradicate biases by trying to keep out the valuations themselves is a hopeless and misdirected venture. . . . There is no other device for excluding biases in social sciences than to face the valuations and to introduce them as explicitly stated, specific, and sufficiently concretized value premises,"<sup>45</sup> because "science becomes no better protected against biases by the entirely negative device of refusing to arrange its results for practical and political utilization."<sup>46</sup> This unavoidable service which science, particularly the social sciences, renders to policy implementation makes it imperative that the scholarly observer distinguishes the "manipulative" from the "contemplative" standpoint.<sup>47</sup> But at the same time he recognizes that these two standpoints are not antithetical to one another. This is why McDougal calls for a distinction between theories of law and theories about law.<sup>48</sup> The for-

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<sup>42</sup>Kaplan, supra note 35, at 381-2; Myrdal, supra note 16 at 51.

<sup>43</sup>Lasswell and Kaplan, *Power and Society* xi (1951).

<sup>44</sup>Ibid.

<sup>45</sup>G. Myrdal, "Methodological Note on Facts and Valuations in Social Science" in his *An American Dilemma* 1027, 1043 (1944).

<sup>46</sup>Id. at 1041.

<sup>47</sup>Lasswell & Kaplan, supra note 43 at xi-xii.

<sup>48</sup>McDougal, "Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry," 4 *J. Conflict Res.* 337-354 (1960).

mer are employed by decision-makers, participating in the processes of authoritative and effective power, as they make and justify choices between alternative courses of action in implementing community policies so as to maximize values. Theories about law refer to these theories which will facilitate successful performance of the relevant intellectual tasks. By keeping clearly in mind the distinction between these standpoints, the scholarly observer can establish his own observational standpoint, which is fundamentally different from that of the active decision-maker. The failure to appreciate this distinction and the difference the decision-maker's and the scholarly observer's function as well as the interrelations between them results in the complacent assertions that the scholar's "primary duty . . . is to seek knowledge and understanding for their own sake"<sup>49</sup> and that science used to achieve "a set of recipes for action, as systematic advice on statement"<sup>50</sup> is "nothing other than a prostitution of the scientific intelligence."<sup>51</sup>

#### IV. Delimitation of the Problem

##### A. The Relation of Law to Social Process

The New Haven school's conceptual framework for inquiry starts with the establishment of a clear focus of inquiry. It demands that one commences by stating which issues need clarification necessary for a more viable solution. We are not living in a "human vacuum" isolated from other communities, nor does law exist on paper independent of human involvements. Thus, among the most significant features of the New Haven school are its positive and realistic conception of the world community and the link of law to the process of the shaping and sharing of values in the world community. Judge Dillard, of the I. C. J., who shares many intellectual affinities with the New Haven school, has written:<sup>52</sup>

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<sup>49</sup>Hoffmann, supra note 39 at 10.

<sup>50</sup>Id. at 8.

<sup>51</sup>Kaplan, supra note 43 at 393.

<sup>52</sup>Dillard, supra note 20 at 629. See also Judge Dillard's separate opinion in Namibia where he emphasizes that "No single, absolute meaning can be attached to the word or concept of a 'dispute'. It must be considered in context and with reference to the purpose intended to be served by [a particular prescription]." [1971] ICJ 154.

To ask, however tentatively, "What are rules?" is unwittingly to endow them with a kind of reality or existence, even a metaphysical existence, which is illusory. Rules of law do not "exist" in the sense in which a tree or a stone or the planet Mars might be said to exist. True, they may be articulated and put on paper and in that form they exist, but, whatever their form, they are expressed in words which are merely signs mediating human subjectivities. They represent and arouse expectations which are capable of being explored scientifically. The "law" is thus not a "something" impelling obedience; it is a constantly evolving process of decision making and the way it evolves will depend on the knowledge and insights of the decision-makers. So viewed, norms of law should be considered less as compulsive commands than as tools of thoughts or instruments of analysis. Their impelling quality will vary greatly depending on the context of application and, since the need for stability is recognized, the norms may frequently provide a high order of predictability. But this is referable back to the expectations entertained and is not attributable to some existential quality attaching to the norms themselves. In other words, our concept of "law" needs to be liberated from the cramping assumption that it "exists" as a kind of "entity" imposing restrictions on the decision-maker.<sup>53</sup>

The focus of inquiry must accordingly be directed to a social process in which people influence one another consciously or otherwise. A clear focus is thus set on a process of interaction relating to particular problems in question. The New Haven school speaks of "process" because there is an on-going interaction among people through time. The term "process" connotes that this interaction is one of continual change in interrelationships over a time period. We speak of "social" because the flesh-and-blood living beings are participants in that process of interaction, and we speak of "the world community" because the existence of the high frequency of interaction and the intensity of interdependence on a global scale causes the aggregate of people inhabiting this "shrunk globe" to realize their common stake. The term "community" has very broad meanings and is often defined loosely in daily conversation. When a group of peo-

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<sup>53</sup> Ibid.

ple who share both common perspectives and a sufficiently high frequency of interaction among them is territorially based, it is appropriate to call it "a community."<sup>54</sup> In any level of community from municipal through regional to global, people seek to broaden their identifications, expectations, and demands about values in both organized and unorganized ways transcending national territorial boundaries since they have become increasingly aware that the conditions under which these values can be secured are rapidly transcending the artificial man-made lines inherited from the arbitrary confines of feudalism. Interdependence on a global scale demonstrates the presence of the world community.<sup>55</sup> The explicit perception of the world community is found in all McDougal's writings. His recent article with Professor W. Michael Reisman supporting the lawfulness of the United Nations action against Rhodesia is a good example.<sup>56</sup> Criticizing the contention that "whatever the Rhodesians have done has been wholly within their own country"<sup>57</sup> and, consequently, is insulated from international concern, and it affects nobody else, they argue that:

In the contemporary intensely interdependent world, peoples interact not merely through the modalities of collaborative or combative operations but also through shared subjectivities--not merely through the physical movements of goods and services or exercises with armaments, but also through communications in which they simply take each other into account. The peoples in one territorial community may realistically regard themselves as being affected by activities in another territorial com-

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<sup>54</sup> There exist communities at various levels of intensity from a small hamlet through a city to a body politic and beyond. The level of community can be defined according to the range of value effects resulting from a given social interaction. See T. Parsons, *The Social System* 91 (1951); Robert MacIver, *Community: A Sociological Study* 22-30 (1936, 3rd edn). See generally Carl J. Friedrich (ed.), *Community* (Nomos II, 1959).

<sup>55</sup> For the relevancy of the world community, see McDougal, Lasswell & Reisman, *supra* note 36, at 189-195; Wilfred Jenks, *Law in the World Community* (1967).

<sup>56</sup> McDougal & Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern," 62 *Am. J. Int'l L.* 1 (1966).

<sup>57</sup> Acheson, *The Washington Post*, Dec. 11, 1966, at E6:5-6.

munity, though no goods or people cross any boundaries. Much more important than the physical movements are the communications which peoples make each other.<sup>58</sup>

To describe the world social process or any level of process, the New Haven school adopts the following scheme:

Man (actor, participant) acts to optimize values (preferred events) through institutions affecting resources.<sup>59</sup>

This formula is called a maximization postulate. The term "values" is used here without any of the metaphysical or other connotations it may have in ordinary language.

Peoples in the world community both make demands and become subjected to counter-demands while trying to maximize all or certain values at their disposal in relation to other participants in the world social process. Eight value-institution categories are used to analyze this process:

-Power:	the giving and receiving of support in government, politics, and law;
Wealth:	the production and distribution of goods and services, and consumption;
Enlightenment:	the gathering, processing, and dissemination of information;
Skill:	opportunity to acquire and exercise capability in vocation, professions, and other social activities;
Well-being:	safety, health, and comfort;
Affection:	intimacy, friendship, and loyalty;

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<sup>58</sup> McDougal & Reisman, supra note 56 at 12.

<sup>59</sup> See generally Lasswell and Kaplan, supra note 43.

- Respect: recognition, whether personal or ascriptive;
- Rectitude: participation in forming and applying norms of responsible conduct.<sup>60</sup>

This is a representative and not an exhaustive list. These eight categories are not ranked in order of importance in any culture; we assume that the relative position of value varies with respect to subjectivities, time, and culture.

Law is a product of and an instrument in the social process in which people seek their preferred events. These groups of preferred events enable the observer to describe social reality more specifically and systematically than does a simple descriptive fiat of the term "social reality."<sup>61</sup> When these value-institution categories or their equivalents are used to analyze any social process, they can be more specific in any degree desired.

The description of events taking place in a particular community in reference to the most comprehensive community of mankind facilitates the clarification of problems in question. The interaction among participants in a social process culminates at a certain point in time and space in specific events where participants lose or gain what they perceive as preferred interests. Such a culmination of events involving losses and gains is called "outcomes," the sequence of which can be differentiated in terms of pre-outcome, outcome, and post-outcome phases. The description of what is happening in the world can be most appropriately broken down into a series of questions:

1. Who participated in a particular process of interaction of varying degree? (Participants)
2. What are the significant perspectives of the participants? Their identification pattern? What are their value demands? How do they perceive conditions under which their value demands will be realized? (Perspectives)

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<sup>60</sup> McDougal has written that "Any derivations by others which support our postulated goals are regarded as acceptable." McDougal, supra note 48 at 343. But see Falk, Book Review, 8 Natural L. Rev. 171 (1963).

<sup>61</sup> See Lasswell & Kaplan 56-73, and passim.

3. Where and under what social conditions does interaction take place? (Situation)
4. What kind of effective means are at their disposal in order to achieve their demands? (Base Values)
5. How do participants manipulate and manage their base values to achieve their objectives? (Strategies)
6. What are the immediate results of the process of interaction? (Outcomes)
7. What are the long term effects of the outcome and process? (Effects)

This is what is called the phase analysis. Some indication may be given to the range of possible responses to such questions.

### 1. Participants

Various individuals and groups participate in a social process. In transnational relations, states, represented by state officials, are still predominant participants. The term "state" is an authoritative symbol accorded to "a body politic," which is a territorially based, highly organized political group. But our principal focus is not so much on institutions or the structures of authority as on actual decision-makers who make decisions with authority and control. When one speaks of a state, one is in fact dealing with a group of effective elites which represents it as "a government."

### 2. Perspectives

Unlike legal fiction, the state, the effective elites who represent it, have their own human psychology and perspectives. A participant in any social interaction frequently uses the word or a set of words to refer to himself as an individual or as a member of a group. Words like "I," "we," "you," and "they," are symbols of the identification system. Identification is whatever the ego identifies with. People differentiate themselves from other people by using these symbols. The pattern of identification may vary depending upon what one is seeking to achieve.

Participants in a social process seek to maximize certain values. When these values are pursued as ends in themselves, they are termed scope values, distinguished from base values when they are managed as a base resource for acquiring other values. Participants make demands



for various values with certain ideas of conditions under which these values will be achieved. These conditions are expectations. They are matter-of-fact references about individuals' past and present experiences and future references. Thus, expectations are subjective perceptions about events.

### 3. Situations

Situations refer to the time and space in which interactions take place and can be divided into four:

**Geographical features:** the geographical areas of interaction and the scope of effects stemming from particular interactions. The recent coup in Cyprus demonstrated that the spatial location of a particular event critically affects its outcome.<sup>62</sup>

**Time features:** The duration and periodicity of interaction.

**Institutionalization:** The degree of organization of situations in which interactions take place. Institutionalization may refer to a particular pattern of interaction which may be open or closed, and centralized or decentralized.

**Crisis level:** The crisis features of interaction may exhibit differing degrees in intensity of expectations. A particular level of crisis may be decisive in lawfully suspending public order, in that the derogation from established community standards is permissible only where necessary to protect community values.<sup>63</sup>

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<sup>62</sup>From the perspective of effective decision-makers, the locus of an operation is sometimes determinative in molding reciprocal tolerance among effective global elites who control what is called "spheres of influence." See Falk, "Introduction," in *idem* (ed.), *The International Law of Civil War* 14-16 (1971). Friedmann, "Intervention and International Law I," in Louis G. M. Jaquet (ed.), *Intervention in International Politics* 40, 42-43 (1971).

<sup>63</sup> Complementary formulations, framed at many different levels of abstraction, are indispensable both to express the whole range of fundamental demands and ex-

#### 4. Base Values

Base values include all values available to a participant in order to seek scope values. A successful lawyer, for example, who has special skill (in logic, adversary tactics) and enlightenment (in law and public policies) thus acquires respect and wealth, may have a good chance to seek power through the affection of his influential friends. How he manages and manipulates these values is conditioned by individual and professional rectitude.

#### 5. Strategies

Strategies are the effective management and manipulation of base values to create desirable value outcomes. Strategies are two-fold: a modality and an instrument. A modality can be coercive when value demands communicated to respondents do not leave a wide range of options from which the respondent can choose. A modality is persuasive when respondents have freedom to choose what they prefer most.

Instruments of policy are of four types. Inter-elite communications are termed diplomatic since the target of communications is specific and there are direct interactions between the communicator and the communicatee. Communications become ideological when the audience of communications is masses of people. The management and manipulation of goods and services are an economic strategy, while the deployment and threat of force is a military strategy. These four strategies are constantly used to create varying degrees of value effects. Any use of strategy cannot be classified dichotomously into war and peace; the level of coercion is a continuum in degree ranging from the maximum persuasion to the maximum

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pectations and to make tentative identifications of the different factual contexts in which different distributions of values are demanded and expected. The immense flow of prescriptions does in fact cover every phase of human interaction and all demanded values--civil, political, social, economic, cultural, and other--and in many particular instances of interaction such values must be in fact competitive, requiring choices among alternative prescriptions--or alternative interpretations of particular prescriptions--and protected values. The necessities and potentialities of this complementarity are explicitly recognized in many of the human rights prescriptions in the form of requirements, first, for the accommodation of particular human rights with other human rights and the aggregate common interest, and second, of permissible derogations from some human rights in times of high crisis and intense threat to aggregate community interest.

coercion.<sup>64</sup> The different use of instruments creates differing degrees of persuasion and coercion.

Outcomes are the immediate results of interaction in the form of value deprivations or value indulgences. Deprivations are the actual loss of values or the blocked gains. Indulgences are actual gains or the blocked loss.

The immediate result of any interaction may have long term effects not only on the locality of the immediate interaction, but on the public order of the world.

This process of social interaction can be specifically described with regard to a particular problem with which one is concerned. Participants make claims demanding that authoritative decisions be made to solve their controversies stemming from the process of interaction. Claims consist of facts, value demands, and policies as entertained by a particular claimant. Claims are not necessarily those claims brought by claimants before some formally organized institutions, such as a court or tribunal, where claims are clearly formulated. But in arenas of a low degree of organization, as Professor Reisman writes, "subjectivities are often modulated by indirect communication. It is the investigator who must infer claims from behavior and formulate them verbally. This exercise necessarily requires an examination of events in the most comprehensive context and the use of inference devices not conventionally employed by the law."<sup>65</sup> In short, we speak of claims when "events" taking place in

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McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies," 14 Va. J. Int'l L. 387, 390 (1974). Compare Article 29 with Article 30 of the Universal Declaration of Human Rights. A similar comparison may be made between Article 21 and Article 22 of the International Covenant on Political and Civil Rights. These two conventions and other important prescriptions on human rights may be found in I. Brownlie, Basic Documents on Human Rights (1971).

<sup>64</sup>Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order 1-39 (1961).

<sup>65</sup>W. Michael Reisman, Nullity and Revision: The Review of Enforcement of International Judgments and Awards 145 (1971).

a given situation demand the attention of authoritative decision-makers. Particular problems about claims are also clarified in the phase analysis. Thus, we speak of the process of claims in terms of claimants, objectives, situations, and so on. The types of claims are, in effect, the summary statement of claims, to which authoritative decision-makers must respond. The detailed analyses of claims are presented in the trend studies section.<sup>66</sup>

When claims are made, decision-makers must respond in order to solve the issues involved in them. How such responses are made is described in the process of authoritative decision.<sup>67</sup> A clear focus on the decision process is facilitated by using phase analysis as in social process. The label "participants" found in the analysis of the social process changes to "authoritative decision-makers" in analysis of the process of decision.<sup>68</sup> It is important to note that in the still highly decentralized contemporary world, participants, particularly state officials, play a dual function as both claimants and as authoritative decision-makers in various contexts. This characteristic feature is called a dédoublement fonctionnel.<sup>69</sup>

Authoritative decision-makers include all participants in the aforementioned social process, although the degree of their participation in the decision-making process may change in varying degrees of consequentiality, depending upon their perspectives, where decision is made, the bases of power available to them and strategies they can use. In de-

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<sup>66</sup> Compare the explanation developed herein with McDougal, Lasswell & Vlasic, *The Public Order of the Space*. The process of social interaction as it pertains to earth-space events is developed in id. at 3-88. The process of claims is described at 85-94. As for the types of claims, compare the enumeration of claims at 90-93 with *Trends in Decision* at 193ff. The same headings may be found regarding claims.

<sup>67</sup> Id. at 94-137.

<sup>68</sup> Compare id. at 3 with id. at 96.

<sup>69</sup> See Scelle, "Le Phenomene juridique du dédoublement fonctionnel," in Schätzl and Schlochauser, *Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg* 324 (1956). For a critique of the doctrine, see Wolfgang Friedmann, *The Changing Structure of International Law* 148 (1964).

scribing the process of decision, the label "arena" is used in place of "situation," for decision-making is a function of power. Thus, it is not an error, as one reviewer has suggested,<sup>70</sup> that the word "situation" is used in one place and the word "arena" in another within a similar phase analysis. Possibly the reviewer failed to appreciate that the processes of interaction and of decision are distinctive.

Hence, "base values" is replaced by "bases of power",<sup>71</sup> which can be divided into "authority" and "control" or effective values. Authority, according to Reisman, is

a set of conditioned subjectivities shared by relevant members of a group; when operative, when tripped so to speak, by outside events, these subjectivities provide the individuals concerned with an indication of appropriate behavior. Authority can be considered a significant determinant of individual or group behavior, not necessarily when it compels a certain course, but when it indicates that course with a degree of clarity sufficient to excite internal tension or psychic dysphoria if an incompatible course is followed.<sup>72</sup>

Control, on the other hand, entails effective values at the disposal of decision-makers. It refers to "resources that can be employed to secure a desired pattern of behavior in others."<sup>73</sup> Thus, Reisman adds: "Control can be used indulgently or deprivationally. It can be employed in conjunction and conformity with authority or without regard to the authority perspectives of the manipulators or manipulated."<sup>74</sup> These two components of power are integral to one another for insuring the enforceability of any decision. Decision devoid of authority is no more than a manifestation of naked power; without control, decision is merely a pretended authority.

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<sup>70</sup>Ramazanti, "International Legal Order: Projections and Developments, 11 Va. J. Int'l L. 152, 154 (1970). See McDougal, Lasswell & Vlasic, supra note 66 at 103.

<sup>71</sup>McDougal, Lasswell & Vlasic, supra note 66 at 105.

<sup>72</sup>Reisman, supra note 65 at 4.

<sup>73</sup>Id. at 5.

<sup>74</sup>Ibid.

Any decision creates effects on various levels of community. A decision made within the decision structure of a given community may affect other larger community processes beyond the original realm of decision. To be effective, any decision must be related to a larger community process.

#### B. Law as Comprehensive Process of Decision in a Community.

The New Haven school does not describe the world's different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass.<sup>75</sup> The focus of inquiry into the interpenetration of the different community processes of the world, from local through regional to global, is "perspectives of authority," i.e., perspectives about who should decide what, with respect to whom, for the promotion of what policies, by what method. Unlike traditional and conventional theories that conceive of international law as a pre-existing set of rules for regulating conduct, which are not significantly affected by the social processes and particularly the power process, New Haven school regards law as an instrument affecting the power process—the process by which some people control others. Power is one of the values decision-makers pursue and exercise. To have power is to be taken into account in other decision-makers' policies. And the values decision-makers demand in order to pursue and exercise power through their identification may be accumulated and be employed as bases of power to influence outcomes in particular interactions. In this continuing process of power shaping and sharing, international law is conceived as one of the instruments of power in that it is "an expression, not of arbitrary political fiat, but of the fundamental policies of peoples. . . ." <sup>76</sup> Here, international law is most realistically observed, not as a mere rigid set of rules but as the whole process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined. "Authority" means expectations of appropriateness as

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<sup>75</sup> McDougal, "The Impact of International Law Upon National Law: A Policy Oriented Perspective," 4 S. Dak. L. Rev. 265, 326 (1959).

<sup>76</sup> McDougal, "Dr. Schwarzenberger's Power Politics," 47 Am. J. Int'l L. 115, 119 (1953).

to who is endowed with decision-making power, what objectives they are expected to pursue, what decision-making procedure they are required to follow and what outcomes they should achieve. Thus, authority is sought not in some transempirical source of "obligation" or "validity" but empirically in the genuine expectations of the people who constitute a given community about the requirements for lawful decision in that community.<sup>77</sup> Control means the making of the policy choices which are, in fact, put into effect in consequential degree. Patterns of authority and patterns of control affect each other, in that expectations as to the authoritativeness of conduct may contribute to encouraging conformance to community expectations, i.e., stabilizing patterns of authority. Specifically, the New Haven school regards international law as:

a comprehensive process of authoritative decision in which rules are continuously made and remade; that the functions of the rules of international law is to communicate the perspectives (demands, identifications, and expectations) of the peoples of the world about this comprehensive process of decision; and that the rational application of these rules in particular instances requires their interpretation, like that of any other communication, in terms of who is using them, with respect to whom, for what purposes (major and minor), and in what context.<sup>78</sup>

Out of this comprehensive on-going process of authoritative and controlling decision flow two types of decisions which determine the quality of the public order the world community seeks to achieve. The first type, those which establish, maintain, and re-establish the whole global process of decision itself, are called the "constitutive" decisions.<sup>79</sup> These guide effective participants of the world community to identify who has authority to make a particular decision, to clarify the basic community policies to be pursued, to establish an appropriate authoritative structure so that decision-makers may perform their functions, to allocate bases of power among different decision-makers for sanctioning purposes, to authorize the appro-

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<sup>77</sup> Lasswell & McDougal, supra note 27 at 384-385.

<sup>78</sup> McDougal, "A Footnote," 57 Am. J. Int'l L. 383 (1963).

<sup>79</sup> For elaboration, see McDougal, Lasswell & Reisman, "The World Constitutive Process of Authoritative Decision," 19 J. Leg. Ed. 253, 403 (1967). Reprinted in 1 Falk & Black (eds.), *The Future of the International Legal Order* 73 (1969).

priate procedures for making decisions and to secure the continuous performance of all kinds of decision functions indispensable to the realization of community values embodied in law. This "constitutive" nature of decision is frequently neglected. A recent example par excellence is the Sabbatino case<sup>80</sup> in which the United States Supreme Court abdicated its active role in the global process of constitutive decision by invoking a distorted concept of "act of state".<sup>81</sup> Traditionally, the court would find it expedient to label the issue involving "constitutive decision" as "political" and take up what it labels "legal" questions which it wishes to decide. In reality, however, the court makes a real decision in both instances as a decision not to decide is itself a decision.<sup>82</sup> Non-decision inevitably involves value deprivations and indulgences, not to mention its effect on the aggregate of expectations shared by effective participants in the world community, and effects may be far-reaching, for the constitutive process is itself maintained by the very expectations of these participants. A realistic perception of the role of the court as an authoritative decision-maker must include not only the application function, but also the prescriptive function. To establish the constitutive process by which authoritative and controlling decisions are made and applied and re-made, seven authority functions are required: intelligence, promotion, prescription, invocation, application, termination, and appraisal.<sup>83</sup> The use of these seven functions incorporated in the constitutive process of authoritative decision helps clarify authoritative expectations with respect to international policies.

The second type of decisions are "public order" decisions as they<sup>84</sup> establish and maintain all features of value process protected by law. The characteristic feature of public order stems from the constitutive process. These public order decisions decide how to shape and share particular values of the community; how individuals or groups of individuals

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<sup>80</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

<sup>81</sup> See McDougal, "Act of State in Policy Perspective: The International Law of an International Economy," in *Private Investors Abroad--Structures and Safeguards* 327 (1966).

<sup>82</sup> W. M. Reisman, *supra* note 65, at 625-634.

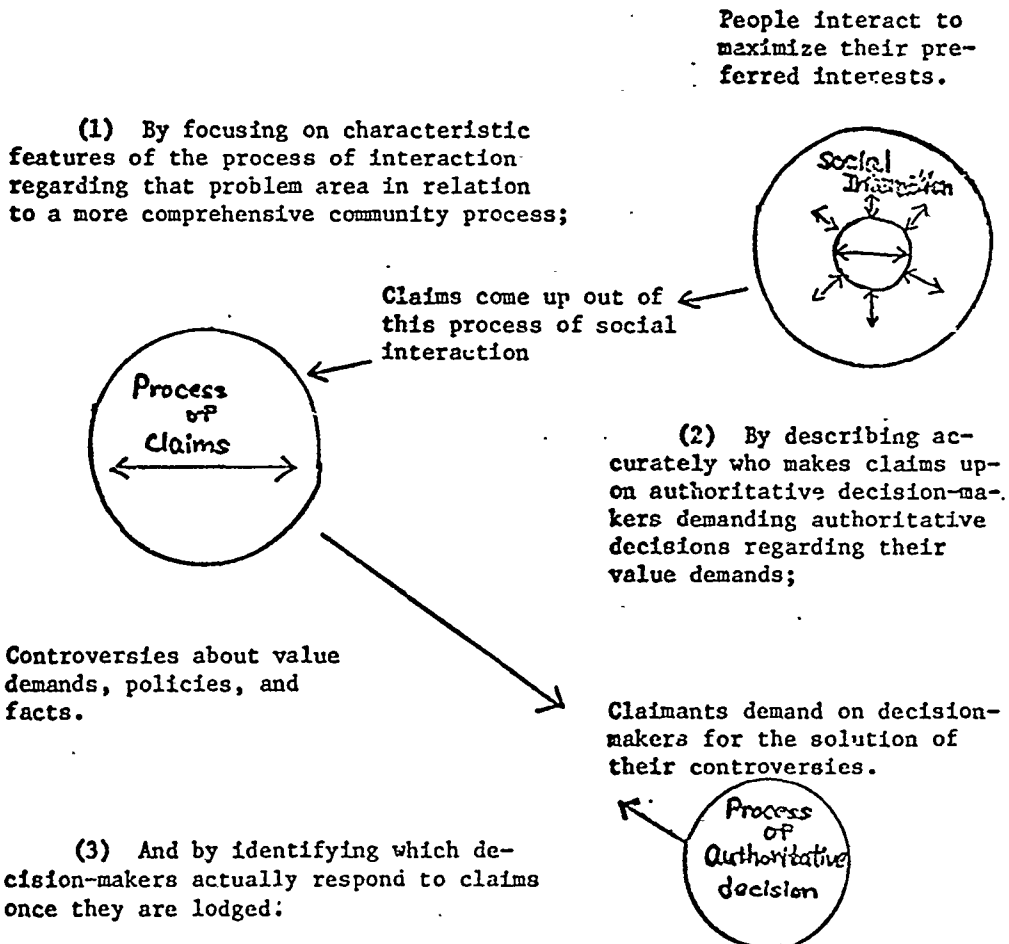
<sup>83</sup> See Harold D. Lasswell, *The Decision Process: Seven Categories of Functional Analysis* (1956).

<sup>84</sup> McDougal, Lasswell, and Reisman, *supra* note 36 at 202-203.



can be protected in securing participation in the power processes; how resources and wealth can be protected and shared; how the well-being of individuals can be secured, and so on. The clarification between these two types of decisions enables discussion to focus not so much on the institutional structure of authority, the narrow obsession with "given rules" and their application as on all relevant features of the process by which decisions are made and applied and their effects on the community. Decision is a decision-maker's response to events and it involves sanctions in the form of deprivations or indulgence. The flow of authoritative and controlling decision is law.

To sum up what has been said above, a given problem can be delimited as follows:



A clear focus on these three different, though interrelated, processes is indispensable for a comprehensive, but appropriately selected, inquiry.

This is the delimitation of the problem. Some critics call it the run-down of the inventory and check-list.<sup>85</sup> But for any responsible and dependable inquiry, to delimit the focus of inquiry is not merely to check all stones and to turn over each of them: the quality of inquiry depends not only upon the depth of research but upon the width of research covering all relevant areas. The comprehensiveness of inquiry and the realistic selectivity of the relevant factors critically affect both how particular problems should be formulated and how different, though interrelated, intellectual tasks should be performed with dependability and realism. The principle of economy is at work in selecting relevant factors for inquiry, and economy can be achieved by performing relevant intellectual tasks. In fact, for any reliable investigative reporter, information about 4H's—Who did What, How, When, and Why—is a minimum requirement. Without it, he cannot write even the first paragraph of a news account.

#### IV. Performance of Intellectual Tasks.

In delimiting the focus of inquiry regarding a particular problem, the disengaged observer, whose perspective is that of a member of the world community, should respond to that problem with a view to improving that community. Any problem-oriented inquiry which contributes to rational decision must include the following five intellectual tasks: the clarification of goals regarding a particular issue, the description of past trends in decision regarding the issue, the analysis of conditions affecting decision, the projection of future trends in decision, and the invention and evaluation of policy alternatives.

##### 1. Clarification of Community Policies.

For an inquiry into conditioning variables other than legal norms, a prime point of departure of the New Haven school is its concept of "law," not as "norms formulated in words which decision-makers feel, or should

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<sup>85</sup>For Professor Fisher of Harvard, more "useful ways of thinking about the problems involved when one country takes action which another may regard as 'intervention' [is] to suggest a few new general criteria for decision than . . . to inventory and catalogue some of the almost limitless factual variables. . . ." Fisher, "A Reply," in Burke, "The Legal Regulation of Minor International Coercion: A Framework of Inquiry," in Roland J. Stanger (ed.), *Essays on Intervention* 87, 124n. (1964). In a similar criticism Oran Young recently contended that the New Haven intellectual apparatus "has failed to support the development of any theory (or theories) in the formal sense. In fact, it tends to hinder the development of theory severely by introducing excessive numbers of potentially relevant factors." In Young's view, "the crucial problem in developing viable formal theories is to construct simple logical models by stripping away as many factors as possible without undermining the predictive accuracy of the resultant propositions." The "rigid formalism" allegedly inherent in the New Haven jurisprudence "frequently makes it

feel, impelled to obey,"<sup>86</sup> but as factors and instruments in "guiding and shaping decision"<sup>87</sup> for the maximization of values. The study of law as a facet of social science cannot be value-free. Social scientists concerned with human conditions cannot avoid evaluation as to what ought to be done about their subject matter.<sup>88</sup> Contrary to Professor Wechsler's assertion of "neutral principles"<sup>89</sup> which transcend "any immediate result that is involved,"<sup>90</sup> what is called for is not only consideration of immediate consequences, but also intermediate and long range effects of particular choices. Without the clarification of goal values, intellectual tasks to evaluate such impact and effects will be subject to arbitrariness and expediency. Accordingly, Wechsler implies the justification of the reallocation of a particular ethnic group of United States citizens on the ground of "a blessing to its victims, breaking down forever the

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difficult to fit observations of the real world into the framework's categorizations with any comfort." He thus complains that "The scheme tends to encourage the proliferation of logically possible boxes or categories that sometimes have little substantive content and that often become difficult to manage in analytic terms." All quotations are from Young, "International Law and Social Science: The Contributions of Myres S. McDougal," 66 Am. J. Int'l L. 60, 69 (1972).

<sup>86</sup> Dillard, supra note 20 at 629.

<sup>87</sup> McDougal, "International Law, Power, and Policy: A Contemporary Conception," 82 *Recueil des Cours* 133, 143 (1953).

<sup>88</sup> In studying what is, we cannot totally rule out what ought to be. In human life the motives and ends of action are part of the process by which action is achieved and are essential in seeking the relation of the parts to the whole. Without the end most acts would have no meaning and interest to us. But there is, nevertheless, a difference between taking account of ends and seeing ends. Whatever may be the possibility of complete detachment in dealing with physical things, in social life we cannot afford to disregard the values and goals of acts without missing the significance of many of the facts involved. In our choice of areas for research, in our selection of data, in our method of investigation, in our organization of materials, not to speak of the formulation of our hypotheses and conclusions, there is always manifest some more or less clear, explicit or implicit assumption or scheme of evaluation.

<sup>89</sup> Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1 (1959). The best and most devastating response to Wechsler's article is Miller and Howell, "The Myth of Neutrality in Constitutional Adjudication," 27 U. Ch. L. Rev. 661 (1960).

ghettos in which they had previously lived."<sup>91</sup> In effect, he seems to argue that, transcending "immediate results," the Nazi persecution of the Jews contributed to the creation of the State of Israel.

Biases and arbitrariness can be minimized only by explicitly clarifying goals and by disciplined and critical evaluation of their ultimate effects on the condition of man. McDougal has stated:

The essence of a reasoned decision by the authority of the secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid foreswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the world of men and values in metaphysical fantasy. The reference of legal principles must be either to their internal—logical—arrangement or to their external consequences of their application. It remains mysterious what criteria for decisions a "neutral" system could offer.<sup>92</sup>

The basic premises of inquiry of the New Haven school in an explicit pre-

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<sup>91</sup>Id. at 27. Compare with Professor Rostow's genuine concern:

The "relocation camps" conducted during World War II for Japanese residents and for Americans of Japanese descent are the precedent for the proposal that concentration camps be established for citizens suspected by believing in revolutionary ideas. Thus can the protection of the writ of habeas corpus be eroded, and the principle lost that criminal punishment can be inflicted only for criminal behavior and then only after a trial by jury conducted according to the rules of the Bill of Rights. Thus can we be led to accept the ideas and techniques of the police state.

Rostow, "The Democratic Character of Judicial Review," 66 Harv. L. Rev. 193, 207-208 (1952).

<sup>92</sup>McDougal, "Perspectives for an International Law of Human Dignity," [1959] Proceedings, Am. Soc'y Int'l L. 107, 121. Reprinted in McDougal & Associates, Studies in World Public Order 987 (1960).

ference for "human dignity" at the highest level of abstraction.<sup>93</sup> With the perspective of members of the whole of mankind, McDougal and his associates recommend for commitment the maximization of values of human dignity. Values of human dignity are not, as some critics suggest, a mysterious notion derived from the metaphysical command or Western values.<sup>94</sup> To suggest that peoples other than Europeans do not seek values for a dignified human existence is to insult them. These values are continuous demands of human beings throughout the history of mankind in different cultures and communities;<sup>95</sup> they have been endorsed in various degrees of abstraction and justification by the United Nations Charter, by the International Covenants on Economic, Social, and Cultural Rights, and on Civil and Political Rights and by many other international agreements and national decisions.<sup>96</sup> The recommendation of these values, however, is not intended as requiring the uniformity of detailed practices and institutional patterns. Once they are accepted as policy goals institutional creativity and diversity are encouraged in the processes for shaping and sharing of values. In a pluralistic society a dignified human existence will not be achieved by imposing one version of institutional practice or public order.

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<sup>93</sup>For a detailed specification of human rights, see McDougal, Lasswell & Chen, "Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry," 63 Am. J. Int'l L. 237 (1969); and McDougal, supra note 63.

<sup>94</sup>Professor Haas asserts that numerous programs for the protection of human rights are based on "traditional Western values rather than the concept of collective freedom more current in the Third World. Hence, European and Western Hemisphere trends run counter to trends elsewhere." Haas, supra note 38 at 119-120. This simplistic contraposition of "individual human rights" and "collective rights" may prove useless once specific empirical references are given to such verbal labels in terms of who wants "collective" rights to achieve what outcomes. Collective rights are the aggregate of individual rights to promote community values.

<sup>95</sup>Cf. Gunnar Myrdal, supra note 22 at 77-82.

<sup>96</sup>The global demands for basic values may be found in Ian Brownlie (ed.), Basic Documents on Human Rights (1971).

In a ceaselessly changing pluralistic world, the clarification and specification of goal values cannot be performed by a definitional statement of "the natural law component"<sup>97</sup> or by efforts of climbing up the logical hierarchy which leads nowhere, but only by the systematic and disciplined performance of relevant intellectual tasks. Those who criticize these values as irrelevant should assume the burden of presenting an alternative set of goal values and take the responsibility for doing so.<sup>98</sup>

## 2. Description of Past Trends in Decision

The second intellectual task is trend studies. Trends are characterized by authoritative responses to the demands made by contending claimants that controversies stemming from their social interaction be solved. The continuing flow of these responses or decisions create and reinforce expectations in the world community. Effective decision made on the basis of these expectations is law. Description of the pattern of past decisions should not be merely "anecdotal in terms of isolated tidbits of doctrine and practice, but rather systematic in terms of degrees of approximation to clarified policies"<sup>99</sup> for a given community. Thus, the purpose of trend studies should not be solely to discover what happened in the past, to unearth "precedents" for the sake of precedent. The description must be made in terms of departure from or approximation to clarified community policies which the observer recommends. When there is no significant decision in the past with respect to a given claim, "doctrine" can be treated as constituting past trends.

Past decisions can be grouped into clusters of claims having common policies and contextual features and each cluster can be further broken down, depending upon a thoroughness of study. A trend study is analytical in that it surveys how particular decisions were made in the past and how, as a result, major values were shaped and allocated toward or away from specified goals. Under each claim, the five intellectual tasks must, in principle, be performed:<sup>100</sup> (1) the clarification of basic policy

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<sup>97</sup> Haas, supra note 38 at 132.

<sup>98</sup> Myrdal, supra note 22 at 73-76.

<sup>99</sup> Lasswell & McDougal, supra note 33 at 391.

<sup>100</sup> Examine McDougal, Lasswell & Vlasic, supra note 61, at 193. A chapter, "Claims Relating to Access and Competence in the Domain or Space" is a detailed analysis of one group of claims. One single claim can be analyzed at length as the principles of economy and appropriate selectivity

regarding the claim in question, (2) the description of trends in decision, (3) the analysis of conditioning factors affecting decision, (4) the projection of the future trends, and (5) the invention of alternatives which will contribute to the realization of goals.

### 3. Analysis of Conditioning Factors Affecting Decision.

Trends in decision demonstrate the degree of discrepancy between the actual pattern of decision and clarified community goals. This discrepancy may be explained by analyzing conditioning factors affecting past decisions, in that all decisions are made within a range of capabilities. Conditioning factors are predispositional and environmental variables which affect individual decision-makers, the range of options from which they can choose, and the degree of possible effectiveness of decision. Such conditions include the decision-makers' personality, culture, class, interests, past experiences, as well as the political climate at the time he makes a particular decision.

Analysis of conditioning factors seeks to identify phenomena that affect the realization of human dignity and to discover the relations between the outcome of social interaction. The New Haven school regards law as a process of decision in which authority and control serve as instruments to guide and shape choices directly affecting the features of public order. These choices must be made to achieve community goals. Thus, in policy-oriented performance of the scientific task, the school's primary concern is not with mere sets of rules or something written on paper, but with consequences brought about the application and creation of a certain decision in a particular context. The process of decision is a continuing response to claims made by people who seek to secure their preferred interests. In this pluralistic world where numerous groups and individuals represent competing as well as conflicting interests, nobody can escape from making a choice from among many complementary norms and from responsibility for that choice. The analysis of conditioning factors explains the reason why a particular decision was made and how it was put into effect. The aggregate flow of these choices

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permit. Five intellectual tasks are performed in a very similar manner as the book is organized. Likewise, take McDougal, Lasswell & Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas," 83 Yale L. J. 900 (1974). This article is a sub-sub-section of a chapter, "Claims Relating to Power," see McDougal, "Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies," 14 Va. J. Int'l L. 387, 407 (1974), and the sub-sub-section, "Claims to be protected in external interactions (nationality)" itself contains the same intellectual format. See the table of contents at 83 Yale L. J. 900 (1974).

through time constitutes the process of "sanction" which maintains the quality of public order.<sup>101</sup> As Kelsen has written, "[t]he view . . . that the verbal expression of legal norm has only one 'true' meaning which can be discovered by correct interpretation is a fiction, adopted to maintain the illusion of legal security, to make the law-seeking public believe that there is only one possible answer to the question of law in a concrete case."<sup>102</sup> When there are two or more possible interpretations of a legal norm or choices of norms, which interpretation or norm should be taken can be an immediate concern for the pattern of value shaping and sharing. The oft-repeated "true-meaning" of a legal norm is said to be "discovered" in the intent of legislators. However, the "true will" of the legislator is also a product of the social process and is affected by not only prior legislation but by many predispositional and environmental variables. In the process of law-making legislators undergo many phases of a complex procedure of negotiations and bargainings. Kelsen wrote elsewhere:

The "jurists" believe and would like to persuade others that they possess an objective or even a scientific method which permits them to designate the single "just" meaning from among those which the interpretation reveals. In reality no such method can only be dictated by a judgment of subjective, political value.<sup>103</sup>

Recognizing the nature of the decision-making process, the New Haven school does not conceive "law" and "policy" as distinct. Rather, it maintains that every application of legal doctrines, be they customary or conventional, to specific factual situations requires the making of policy choices. For every decision made at any level of community is to affect the pattern of value production and distribution. A decision is, therefore, a policy involving sanctions.

Law is not mere authoritative rules, formal doctrines, or policy crystallizations of the past. When it is observed as a static body of rules, the nature of the decision-making process is neglected and obscured. The process of decision-making is, in part, the continuous process of redefinition of formal doctrine in its application to ever-changing facts and claims within the limit of capabilities by which a formal doctrine is given a meaning and made effective.

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<sup>101</sup>Reisman, "Sanctions and Enforcement," 3 Black & Falk (eds.), *The Future of the International Legal Order* 273 (1972).

<sup>102</sup>Hans Kelsen, *The Law of the United Nations* xiv (1950).

<sup>103</sup>Hans Kelsen, *Legal Technique in International Law: A Textual Critique of the Covenant of the League*, *Geneva Studies* Vol. X, No. 6, at 14-15 (1939).



#### 4. Projection of Future Trends.

No responsible decision-maker or observer who recommends a certain policy can be indifferent about future consequences of a particular action, let alone its immediate result. Unlike many scientific studies which are backward oriented which summarize past data or verify events which occurred in the past—in essence, policy is future-oriented. And the future, like the past, is contextual. Since any effective decision depends upon expectations about the future, these assumptions must be subjected to disciplined inquiry and procedures for their assessment about conditioning factors and past changes in the composition of trends.

#### 5. Invention and Evaluation of Policy Alternatives.

The fifth and last intellectual task is the "pay-off" function in a problem-oriented approach. If the goal we set at the outset is to be pursued, we must invent the most effective and advantageous strategies for realizing that goal. This is the creative invention and evaluation of policy alternatives. A decision must be made in such a way as to increase value effects toward greater conformity with all clarified goals.

When there are two or more possible interpretations or norms, the decision-maker always has a choice between them. At this point, the New Haven and the Vienna schools move to opposite poles. Although both schools share some views about the nature of decision-making, they draw very different conclusions from them. Kelsen maintained that "the realization of the social aim" is "the function of the politician to determine"<sup>104</sup> but "the task of a legal scientist interpreting a legal instrument is to show its possible meanings and to leave it to the competent legal authority to choose in accordance with political principles the one with which this authority [the official] thinks the most appropriate."<sup>105</sup> The choice between the different meanings of a legal norm, if not guided and determined by a legal norm of a higher standing, is determined by extra-legal norms, that is, by political norms. Such an intrusion of political norms, contends Kelsen, should not be permitted in pursuit of knowledge. Thus, Kelsen insisted that policy consideration "is not juridical but specifically political. It is the domain par excellence of the politicians."<sup>106</sup> The Kelsenians insist that politics should be di-

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<sup>104</sup>Id. at 15.

<sup>105</sup>Hans Kelsen, *What Is Justice?* 368 (1957).

<sup>106</sup>Kelsen, supra note 103 at 15.

vorced from the science of law because the legal scientist's task is to search for "truth" and it should be independent of politics. "Science," Kelsen asserted, "is a function of cognition; its aim is not to govern but to explain. To describe the world is its object."<sup>107</sup> And the separation of science from politics demands the scientist "restrict himself to an explanation and a description of his object without judging it as good or bad, that is, as being in conformity with, or contrary to, a presupposed value."<sup>108</sup> Kelsen, therefore, described his position as a scientist faced with two or more possible interpretations of a legal norm to the effect that:

In showing the possibilities which the law to be applied opens to the legal authority [officials], the legal scientist scientifically serves the law-applying function; and in revealing the ambiguity, and thus the necessity for improving the wording, he serves the law-creating function in a scientific way. If the legal scientist recommends to the legal authority one of the different meanings of a legal norm, he tries to influence the law-making process and exercises a political, not a scientific, function; if he presents this interpretation as the only correct one, he is acting as a politician in the disguise of a scientist.<sup>109</sup>

The New Haven school stands in sharp contrast with this insistence that the legal scientist or the scholarly observer should not make the choice between accepting or rejecting the law on the basis of his judgment about what is good and bad. A policy-oriented jurisprudence strikes down the myth that "science" has a value-free or neutral function. It insists that the legal scientist must be a responsible citizen of the world community and should extend "his role beyond mere inquiry into an advice about legal syntacts . . . to the further tasks of inquiry into advice about the possible effects upon overall community values of the various alternatives that the legal forms afford."<sup>110</sup>

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<sup>107</sup> Kelsen, supra note 105 at 350.

<sup>108</sup> Ibid.

<sup>109</sup> Id. at 368.

<sup>110</sup> McDougal, supra note 87 at 157.

There then arises the question as to the range of possible practical applications of the information scientists possess. If the possibility of its application into practice is always only one, there is nothing to be concerned with in terms of the desirability of the role of scientist as an adviser to a "Prince." The question with which the scientists are faced in daily life is, rather, whether or not their task is limited merely to explaining "a world" and posing problems for future action and thus simply leaving the question how to solve them in the hands of official decision-makers only.<sup>111</sup> Science cannot be identical with "the product of inquiry." Science is an on-going, endless "process" of inquiry into what science produces.<sup>112</sup> And a task for scientist in this process of inquiry is to clarify the goals of inquiry to which the allocation of knowledge will be made for the promotion of certain values.<sup>113</sup> This approach, originated by Lasswell, has been called policy science,<sup>114</sup> i.e., the study of policy which promotes democratic values. Lasswell has written that

By laying the accent on policy we are not attacking objectivity. On the contrary, objectivity is just where it belongs, which is in the service of good values. Policy includes not only breathless, short-run objectivities: policy also comprises intermediate and long range aims and it is in relation to the latter that scientists can make their greatest contribution.<sup>115</sup>

Critics of policy science assert that its adherent, who seeks to gather intelligence and enlightenment about policy issues and make re-

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<sup>111</sup>See Robert S. Lynd, *Knowledge for What?* (1939) and K. Mannheim, *Man and Society in an Age of Reconstruction* (1940); particularly chs. IV, V, VI.

<sup>112</sup>Abraham Kaplan, *The Conduct of Inquiry* 400 (1964).

<sup>113</sup>Gunnar Myrdal, *Asian Drama* 5-8 (1968).

<sup>114</sup>See, generally, Harold D. Lasswell, *Pre-View of Policy Sciences* (1971); see also Lasswell, *Power and Personality* 108-147 (1948); and Daniel Lerner & Lasswell (eds.), *The Policy Sciences* (1951); Lasswell, *The Future of Political Science* (1963).

<sup>115</sup>Lasswell, *Power and Personality* 122 (1948).

commendations to decision makers,"will, at best, 'turn into an administrator, distinguished from some of his colleagues only by having been recruited from the intellectual community,' or turn into a gadfly, or become the politician's Peeping Tom."<sup>116</sup> At worst,

he will become the docile or deceived "expert" who obligingly shows to the decision-makers how they can best use for their purposes the techniques of his own field, and who shows to his colleagues how the decision-makers' purposes and his original goals really amount to the same thing. The result, I submit, is a violation of the scholar's duty to serve truth and of his necessary commitment to freedom without which the search for truth is a farce.<sup>117</sup>

The misconception that "the manipulative standpoint" and "the contemplative standpoint" are mutually exclusive is obvious in their observation. The overriding policy consideration is, of course, the promotion of values of human dignity in the highest level of abstraction. In each instance we will be able to go down the ladder of abstraction to the specific goal. In fact without the promotion of these basic values, "the search for truth", which Professor Stanley Hoffmann asserts as a primary duty of a scientist, can hardly be conducted. A critical question is the degree to which one is conscious of policy preconceptions. The divorce from the basic policy and the invention of an alternative to achieve that policy does not set science free, but rather render it the captive of prejudice, biases, and the expedience of power, and furthermore, policy devoid of the scientific inquiry and guidance is doomed to lose its rational orientation for the promotion of the basic values of human dignity.

The policy recommendation the New Haven school seeks is based on reasonableness in a particular context of issues. The reasonableness of the scope and range of value demands made by claimants in their interactions are examined with reference to policies of the maximization of basic values for a dignified human existence.

In the world which lacks a centralized organ to pass judgment upon the lawfulness of action, state officials assume the most important role in the world decision process. National decision-makers are simultaneously concerned with exclusive interests and inclusive interests in the present

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<sup>116</sup> Stanley Hoffmann, *Contemporary Theories in International Relations* 11 (1960).

<sup>117</sup> Ibid.

highly interdependent world community; they serve a dual function as claimants on the one hand, and as external decision-makers passing judgment upon the claims of others on the other hand. Reasonableness as the basis of lawfulness is sought by striking the balance of minimum exclusive interests and maximum inclusive interests in context, and thus a passive principle of lawfulness based on "illegality not proven" is rejected in the New Haven school.<sup>118</sup> Reasonableness in a particular context does not mean expediency or particular aims, but the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in a given instance of claims and counter-claims. A decision in terms of "reasonableness" is the very opposite of "arbitrariness." The postulation of the basic values of human dignity as the basis of appraisal does not mean that "adherence to values of such a kind or in such a way as to interfere with scientific objectivity"<sup>119</sup> is necessary. Such an adherence may be called a bias, and indeed "values," writes Abraham Kaplan, "makes for bias, not when they dictate problem, but when they prejudice solutions."<sup>120</sup>

The New Haven school thus rejects the validity or relevancy of "precedents" for the sake of the consistency to the ceremonial pattern of decision in the past.<sup>121</sup> Consistency in, and conformation to, "decision" we need desperately are the actual pattern of policy embodied in decision which result in greater approximation to human dignity. The past decisions made in a different social context cannot dictate simultaneously what is and what ought to be in the future.<sup>122</sup> The survey of the past

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<sup>118</sup> See McDougal & Feliciano, supra note 64 at 216, 209n. See also McDougal & Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale L. J. 648 (1955), reprinted in McDougal and Associates, supra note 92 at 763. But, cf. Anderson, "A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes," 57 Am. J. Int'l L. 379 (1963).

<sup>119</sup> Kaplan, supra note 110 at 398.

<sup>120</sup> Id. at 382.

<sup>121</sup> W. M. Reisman, supra note 65 at 235-36.

<sup>122</sup> This is what is referred to as a "normative-ambiguous" statement. A normative statement which can mean, indiscriminately, a policy of past decisions, a projection of future decisions, an individual speaker's pre-

decisions is important, however, to clarify to what extent the goals we prefer have been realized or not. Not infrequently, we would find that past decisions exhibit the gap in reality between goals we want to achieve and actual outcomes. This disparity may be explained by analyzing conditions which accounted for particular decisions in the past. When we project probable future developments, we may encounter the situation where the continuation of the existing patterns of public order will perpetuate the trend away from the goals we prefer. We must, then, consider the probable value consequences of alternatives upon not only immediate parties concerned, but also larger communities in space and long range effects thereupon in time. The New Haven school calls for innovative and creative change in decision patterns so as to approximate the goals. As McDougal aptly stated, "law is not a frozen cake of doctrine designed only to protect interests in status quo."<sup>123</sup> Hence, the dichotomous principles of lex lata and lex ferenda are not useful unless they are complemented by other relevant intellectual tasks.

## V. Appraisal

The New Haven school has aided contemporary scholars and decision-makers alike to construct adequate tools for the study of the interrelations of law and the world social process. Its three major characteristics are: (1) it is contextual, in that all relevant variables of the social process of immediate concern in relation to the whole context of the world social process are taken into account in the focus of inquiry; (2) it is problem-oriented, in that it contributes to the solution of the exigent problems by offering specific tools appropriate for inquiry; and (3) it is multi-method, in that it provides a comprehensive set of intellectual skills, procedures, and analytical framework for rational decision-making. The application of the comprehensive analytical framework makes it possible to relate the authority process to the power process by bringing "some of the best contemporary critical thought" from other disciplines to bear upon the study of law, and thereby contributing to ascertaining common interests in particular claims, i.e., to discovering a policy which facilitates the greater production and wider distribution of values of human dignity. The true scientific value and significance of the New Haven

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ference for certain future decisions, or any combination of these. A normative proposition without a delineation of policy in a context necessarily confuses performance of legal tasks. See Lasswell & McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. 203 (1943), reprinted in McDougal & Associates, supra note 91 at 42, 119.

<sup>123</sup> McDougal, "Law and Power," 46 Am. J. Int'l L. 102, 111 (1952).

school is its approach which is founded in the careful craftsmanship, depth and breadth of research. It is "its focus on norm generation and the stimuli to it"<sup>124</sup> to which we are compelled to pay respect, but not necessarily to its "substantive output", i.e., the personal views of those who use the approach on particular issue. In fact, the New Haven school has long been identified with Professors McDougal and Lasswell, originators and promoters of their theory about law. The real strength of the New Haven jurisprudence, however, lies in a flexibility and broad-mindedness which encourages students to undertake experiments and modifications of the approach in their application to critical problems. As is frequently the case with personalized theories, the "cult of personality" which does not permit deviation from the originator's own doctrine has never developed about McDougal and Lasswell. Professor Eugene V. Rostow has observed that "the most remarkable feature of McDougal's influence as a teacher is that so few of his pupils experience a need to demonstrate their independence by rebelling. . . . He has established not a sect, but a school. In almost every case, his students are indeed scholars, not acolytes. What they learn from McDougal and Lasswell is a systematic way to study law, and to judge it, as an integral part of the social process, in its relationship to all the forces, social and moral, which shape the law, and guide its course through time."<sup>125</sup>

## VI. For the Future

As Frederick S. Tipson points out,<sup>126</sup> the Yale Law School as the resource of young scholars contributed tremendously to the development of the New Haven school. Graduate law students, both American and non-American, who had been seeking a problem-oriented approach beyond the conventional intellectual framework, were readily attracted to McDougal and Lasswell. Those graduate students who developed their own skill through personal contact and friendship with their teachers have now formed a broader "constituency" for the New Haven school. Many of them are assuming leading roles in their own schools.

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<sup>124</sup> Gould and Barkun, *International Law and the Social Sciences* 197 (1970).

<sup>125</sup> Rostow, "Book Review," 82 *Yale L. J.* 829, 831 (1973).

<sup>126</sup> Tipson, "The Laswell-McDougal Enterprise: Toward A World Public Order of Human Dignity," 14 *Va. J. Int'l L.* 535, 584 (1974).

The future of the New Haven school, however, lies not so much in personal contact with McDougal, Lasswell, and Reisman in Yale's classrooms as in a national association for a continuing seminar in Law, Science, and Policy transcending the classroom of Yale. Such an association will be a forum as well as a medium for those who are interested in a policy-oriented approach to promote the needs of a jurisprudential consideration of policy and foster such study. To be viable through time, any school must reach beyond a single institution. An open, inclusive association aimed at fostering the study of law and policy and improving the intellectual apparatus for rational decision, is an imperative necessity today. A national journal specialized in law and policy may be a medium for the promotion and dissemination of these ideas.